82-121

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN CLAYBURN HAWKINS, JR., a/k/a "J.C." and RECEA HOWELL HAWKINS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a conspiracy conviction under 18 U.S.C. §1962(d) merge with a conviction under 18 U.S.C. §1962(c) for the purpose of sentencing when the evidence of *both convictions* is identical?

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NO.

JOHN CLAYBURN HAWKINS, JR., a/k/a "J.C." and RECEA HOWELL HAWKINS,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN CLAYBURN HAWKINS, JR., a/k/a "J.C." and RECEA HOWELL HAWKINS, petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

On March 12, 1982, the United States Court of Appeals for the Eleventh Circuit issued an Opinion affirming the Trial Court's Motion to Correct Illegal Sentence which had

been filed in the Trial Court on May 21, 1981. The United States Court of Appeals for the Eleventh Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc on May 24, 1982.

The Per Curiam Opinion of the United States Court of Appeals for the Eleventh Circuit is attached hereto as Appendix "A". Attached hereto as Appendix "B" is the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc. The Trial Court's Order, filed June 24, 1981, denying the Petitioners Motion to Correct Illegal Sentence is attached hereto as Appendix "C".

CUSTODY OF PETITIONERS

The Petitioners are both presently incarcerated within the Federal Correctional System. JOHN CLAYBURN HAWKINS is at the Federal Correctional Institute in Talladega, Alabama, while RECEA HOWELL HAWKINS is presently incarcerated at the El Reno Federal Correctional Institute in El Reno, Oklahoma.

JURISDICTION

Jurisdiction was initiated in this case by an indictment returned by a Federal Grand Jury in the Middle District of Georgia on June 9, 1976. These Petitioners convictions were upheld in *United States v. Elliot,* 571 F.2d 880 (5th Cir., 1978).

A Motion to Correct Illegal Sentence was filed on May 21, 1981 and denied on June 24, 1981.

Jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(a).

STATUTORY PROVISIONS

18 U.S.C. §1962(c) reads as follows:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which effect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. §1962(d) reads as follows:

"It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this Section."

STATEMENT OF THE CASE

The Petitioners herein appeal from the denial of the Motion to Correct Illegal Sentence which was filed in the Trial Court on May 21, 1981. The Trial Court entered its Order on June 24, 1981 denying the motion in its entirety.

The Petitioners Motion to Correct Illegal Sentence, pursuant to Rule 35, Federal Rules of Criminal Procedure, was filed following their convictions and sentences in 1976 for violations of 18 U.S.C. §1962(c), §1962(d), and various other offenses.

Each of these Petitioners were sentenced under the two above cited provisions of 18 U.S.C. §1963 to 20 years imprisonment on Subsection (d), and to 20 years imprisonment for the violation of the (c) provision, with the sentences as to these two violations to run consecutively.

The proof adduced during the trial by the Government which was relied upon to convict these Petitioners of the

conspiracy and substantive violations of 18 U.S.C. §1963 was basically identical. Both of these Petitioners were charged with being associated with an enterprise which was engaged in the commission of thefts, receiving, concealing and fencing stolen property, illegally trafficking in narcotics and other dangerous drugs, and engaging in other criminal activities. The acts of this enterprise were performed from on or about December 3, 1970 up to and including June 9, 1976.

The Petitioners appealed to correct their sentences on the ground that the consecutive nature of the sentencing for the two provisions under 18 U.S.C. §1962 was illegal.

REASON FOR GRANTING THE WRIT

I.

THE CONSPIRACY CONVICTIONS UNDER 18 U.S.C. §1962(d) MERGED WITH THE 18 U.S.C. §1962(c) CONVICTIONS FOR THE PURPOSES OF SENTENCING UNDER THE CIRCUMSTANCES OF THE TRIAL HEREIN.

The United States Court of Appeals for the Ninth Circuit in *United States v. Rone,* 598 F.2d 564 (9th Cir., 1979), in addressing the same point as is raised herein, ruled that consecutive sentences for violations of 18 U.S.C. §1962(c) and (d) were appropriate and legal. The opinion of the Ninth Circuit in *Rone, supra.* relied on this Court's decision of *Blockburger v. United States,* 284 U.S. 299 (1932), and on the belief that 18 U.S.C. §1962 was enacted as an additional tool for the prevention of racketeering activities,

and that to prevent consecutive sentencing under these provisions would nullify the intent and effect of the statute.

The United States Court of Appeals for the Sixth Circuit sitting *en banc,* spoke to this same issue in *United States v. Sutton,* 642 F.2d 1001 (1980). At page 1040 of the *Sutton* Opinion, the Court spoke to the sentencing question which is herein raised. The Court stated:

> "...We hold that the proofs in this record showing these defendants violated Section 1962(c) and §1962(d) were identical. Under the circumstances, we believe that the conspiracy convictions under Section 1962(d) merge with Section 1962(c) convictions for the purposes of sentence. In all instances where a sentence on a Section 1962(d) has been made consecutive to a sentence on a Section 1962(c), the sentences for violating Section 1962(d) are hereby vacated and remanded to the District court for entry of sentences under Section 1962(d) concurrent with those imposed for violations of Section 1962(c)."

Due to this split within the Circuits, and due to the ever increasing use of these statutes by Federal prosecutors, it is submitted to this Honorable Court that this issue is worthy of its consideration and that this Petition for Writ of Certiorari should be granted.

CONCLUSION

Review of the Court of Appeals Decision is necessary in order to resolve the split between the Circuits as described herein, and to give appropriate guidance to the Courts Below due to the ever-increasing use of the particular statutory sections involved herein by Federal prosecutors.

Respectfully Submitted:

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Attorney for Petitioners:
JOHN C. HAWKINS, JR., and
RECEA H. HAWKINS

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was, on this ___ day of _____, 1982, mailed, postage prepaid, to the Honorable REX E. LEE, U.S. Solicitor General, U.S. Department of Justice, Washington, D.C. 20530.

Appendix "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7564

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN CLAYBURN HAWKINS, JR.,
a/k/a "J.C." and
RECEA HOWELL HAWKINS,

Defendants-Appellants.

Appeal from the United States District Court
For the Middle District of Georgia

(March 12, 1982)

Before FAY, VANCE and ARNOLD*, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

*Honorable Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7564

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN CLAYBURN HAWKINS, JR., a/k/a
"J. C." and RECEA HOWELL HAWKINS,
Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Georgia

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion March 12, 1982, 11 Cir., 198__, ____ F.2d ____).

(MAY 24, 1982)

Before FAY, VANCE and ARNOLD*, Circuit Judges.

*Honorable Richard S. Arnold, United States Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG-6

THE COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAY 24, 1982

NORMAL E. ZOLLER
CLERK

Appendix "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed at 4:20 p.m.
JUN 24 1981
/s/ Helen G. Leslie
Deputy Clerk, U.S. District Court

UNITED STATES OF AMERICA,	:	
	:	
Respondent-Plaintiff,	:	
	:	
vs.	:	CRIMINAL NO.
	:	76-84-MAC
	:	
JOHN CLAYBURN HAWKINS, JR.,	:	
a/k/a "J.C.", and	:	
RECEA HOWELL HAWKINS,	:	
	:	
Petitioner-defendants.	:	

ORDER

Petitioner-defendants J. C. Hawkins, Jr. and Recea Howell Hawkins move the court pursuant to Rule 35, Federal Rules of Criminal Procedure, to correct the sentences imposed by this court on the grounds that the

sentences as imposed violate double jeopardy.[1] Defendants were tried and convicted in this court in 1976 for violations of 18 U.S.C.A. §1962(c) (hereinafter "RICO substantive offense"), §1962(d) (hereinafter "RICO conspiracy"), and other criminal offenses.[2] Each of these petitioners was sentenced under 18 U.S.C.A. §1963 to twenty (20) years imprisonment on Count One, the RICO conspiracy, and to twenty (20) years imprisonment on Count Two, the RICO substantive offense, with the sentences to run consecutively. Defendant J. C. Hawkins was given additional consecutive sentences on four other counts, and Recea Hawkins was given a consecutive sentence on one additional count.

The essential question raised by defendants' Rule 35 motion is whether a conviction under §1962(d) of a RICO conspiracy merges with a conviction under §1962(c) of a RICO substantive offense, thereby precluding imposition of consecutive sentences for those convictions.[3] This precise

---

[1]These defendants' convictions were upheld in *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978).

[2]18 U.S.C.A. §1962 is a part of the Racketeer Influenced and Corrupt Organizations Act (RICO). Subsections (c) and (d) of §1962 provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (c) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

[3]The court may correct an illegal sentence at any time. Rule 35(a), Fed.R. Crim.P. If §1962 does not permit imposition of consecutive sentences for convictions under subsections (c) and (d), defendants can properly attack their sentence as being illegal. *See, United States v. Cerallos*, 538 F.2d 1122 (5th Cir. 1976).

question was addressed and well-analyzed by the Ninth Circuit Court of Appeals in *United States v. Rone,* 598 F.2d 564 (9th Cir. 1979). Applying the decision of the Supreme Court in *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 and its own earlier decision in *United States v. Ohlson,* 552 F.2d 1347 (9th Cir. 1977),[4] the court in *Rone* considered whether or not "Wharton's Rule" prevented the defendants there from being convicted and sentenced to consecutive terms for both a RICO conspiracy and the substantive RICO offense. Wharton's Rule is an exception to the general rule that a conspiracy and the substantive offense that is its goal do not merge. The Rule states than an agreement between two people to a particular crime cannot be prosecuted as a conspiracy if the crime is of the type that necessarily requires the participation of two persons for its commission. *Iannelli, supra,* 420 U.S. at 773 n.5, 43 L.Ed.2d at 621 n.5. The classic Wharton's Rule crimes are adultery, incest, bigamy, and dueling.

The Ninth Circuit correctly concluded that §1962(c) is not within the scope of Wharton's Rule, 598 F.2d at 570. A violation of §1962(c) does not necessarily require the participation of two persons for its commission. As the Ninth Circuit held in *Ohlson, supra,* at 1349, "the plain language of §1962(c) . . . clearly imports that a violation may be committed by an individual acting alone." Even a single individual may be considered an enterprise under the statutory definition. 18 U.S.C. §1961(4). *See, United States v. Elliott, supra,* at 898 n.18. Therefore, under

---

[4]*Ohlson* dealt with convictions for violation of the general conspiracy statute, 18 U.S.C.A. §371, and a substantive violation of the RICO statute, 18 U.S.C.A. §1962(c). *Iannelli* dealt with prosecution, conviction, and sentencing under the general conspiracy statute and §1955, a federal gambling statute.

Wharton's Rule there is no merger of the RICO conspiracy and substantive offense.

The Ninth Circuit in *Rone* further considered whether Congress intended to maintain a distinction between a RICO conspiracy under §1962(d) and the RICO substantive offense of racketeering proscribed in §1962(c), and whether such an intent is evident from the language and legislative history of §1962.[5] Section 1962 makes it unlawful for "any person" to conduct an "enterprise" affecting interstate or foreign commerce through a "pattern of racketeering activity." The definitions of "enterprise," "pattern of racketeering activity," and "racketeering activity" do not incorporate any element of agreement or concerted activity, the essential element of conspiracy. *See,* 18 U.S.C.A. §1961 (1), (4), and (5). Moreover, there is nothing in the legislative history of the statute to suggest that Congress did not intend to create an offense of racketeering separate and apart from conspiracy. *Ohlson, supra,* at 1349. In fact, inclusion in §1962 of the subsection d) RICO conspiracy offense when a defendant could be prosecuted in any event under the general conspiracy statute, 18 U.S.C.A. §371, evidences an intent on the part of Congress to create a RICO conspiracy offense separate from the substantive racketeering offense. *See, Rone, supra,* at 570. *Also see, United States v. Bright,* 630 F.2d 804, 813 (5th Cir. 1980) (conspiracy to violate RICO and aiding and abetting a violation of RICO are separate and distinct offenses).

The precise issue in the case *sub judice* is whether defendants, having been convicted of both a RICO con-

[5]Wharton's Rule does not rest on principles of double jeopardy, and only in the absence of legislative intent to the contrary does the rule create a judicial presumption of merger, assuming its definitional prerequisites are met. *Iannelli,* 420 U.S. at 782, 43 L.Ed.2d at 625.

spiracy and racketeering, could legally be sentenced to consecutive terms for those convictions. The Ninth Circuit in *Rone* held that consecutive sentences can properly be imposed for convictions of a RICO conspiracy under §1962(d) and for racketeering under §1962(c), relying on language of the Supreme Court in *Iannelli,* to wit:

> ". . . we do not imply that the distinct nature of the crimes of conspiracy to violate and violation of §1955 should prompt prosecutors to seek separate convictions in every case, or judges necessarily to sentence in a manner that imposes an additional sanction for conspiracy to violate §1955 and the consummation of that end. *Those decisions fall within the sound discretion of each, and should be rendered in accordance with the facts and circumstances of a particular case. We conclude only that Congress intended to retain these traditional options. Neither Wharton's Rule nor the history and structure of the Organized Crime Control Act of 1970 persuade us to the contrary.* (emphasis supplied).[6] 420 U.S. at 791, 43 L.Ed.2d at 631.

Thus, under *Iannelli* the imposition of consecutive sentences for convictions of both §1962(c) and §1962(d) is within the sound discretion of the trial judge.

---

[6]RICO was passed as Title IX of the Organized Crime Control Act of 1970, P.L. No. 91-451, H.R. Rep. No. 98, 91st Cong. 2nd Sess., reprinted in [1970] U.S. Code Cong. & Ad. news, 4007. The Fifth Circuit noted in *U.S. v. Elliott, supra:*

> "In enacting RICO, Congress found that 'organized crime continues to grow' in part 'because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.' Thus, one of the express purposes of the Act was 'to seek the eradication of organized crime . . . by establishing *new penal prohibitions,* and by providing *enhanced sanctions and new remedies* to deal with the unlawful activities of those engaged in organized crime.' Pub.L. 91-452, §1, 84 Stat. 922." (emphasis supplied). 571 F.2d at 902.

Defendants contend, however, that since the evidence utilized for the convictions of both defendants on the §1962(c) racketeering count and the §1962(d) conspiracy count was substantially identical, the conspiracy convictions merged with the racketeering convictions for the purposes of sentence so that the court could impose only concurrent sentences on those counts. Defendants rely on the case of *United States v. Sutton,* 642 F.2d 1001 (6th Cir. 1980) (*en banc*). In *Sutton* the Sixth Circuit found that while *Iannelli* validated the indictments under both §1962(c) and §1962(d), since the proofs showing the defendants violated §1962(c) and §1962(d) were identical, the conspiracy convictions merged with the §1962(c) convictions for purposes of sentence. This is, of course, contrary to the holding of the Ninth Circuit in *Rone, supra.*

The *Sutton* court did not elucidate upon its conclusion that convictions under §1962(c) and §1962(d) merge for purposes of sentencing, nor does it mention *Rone.* The court in *Sutton* was concerned with the fact that the trial judge there has made sentences pursuant to §1962(c) and §1962(d) concurrent in some instances but consecutive in others. Significantly, the *Sutton* court's conclusion that the conspiracy and substantive offenses merged for sentencing purposes ignores the explanation of the Supreme Court in *Iannelli,* quoted above, that the decision to impose consecutive sentences falls within the sound discretion of the trial judge, depending on the facts and circumstances of each case.

Further, this court does not agree with the Sixth Circuit's conclusion that the convictions under §1962(c) and (d) merge because substantially the same evidence was used to prove both offenses. *See, Ohlson, supra,* at 1349. The test articulated in *Blockburger v. United States,* 284 U.S. 299,

52 S.Ct. 180, 76 L.Ed. 306 (1932) provides that in determining for double jeopardy purposes whether separate punishment might be imposed for acts violating two separate statutory provisions, the court must examine the offenses to ascertain "whether each provision requires proof of a fact which the other does not," *Id.*, 284 U.S. at 304, 76 L.Ed. at 306. The court's application of the test focuses on the statutory elements of the offense. *Iannelli, supra,* 420 U.S. at 784 n.17, 43 L.Ed.2d at 627 n.17. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crime, *Id.* Conspiracy and the substantive offense that is the object of the conspiracy are generally separate and distinct crimes, *United States v. Ocanas,* 628 F.2d 353, 362 (5th Cir. 1980), with the exceptions being those crimes which fall under Wharton's Rule. The essence of the crime of conspiracy is agreement, an element not contained in the statutory definition of the §1962(c) offense of conducting an enterprise in interstate commerce through a pattern of racketeering activity. *See, infra,* p. 3. Further, proof of violation of §1962(c) requires establishment of a fact not required for conviction of conspiracy to violate that statute. To be convicted under §1962(c), a defendant must be proven to have engaged in a "pattern of racketeering activity," which requires at least two acts of racketeering activity, 18 U.S.C.A. §1961(1), as defined in 18 U.S.C.A. §1961(1). A conviction under §1962(d) of a RICO conspiracy offense only requires proof that an individual by his words or actions manifested an *agreement* to participate, directly or indirectly, in the affairs of the enterprise through the commission of two or more predicate crimes. *United States v. Elliott, supra,* at 903. For example, proof of such an agreement and one act by the

enterprise of racketeering activity would be sufficient to convict a defendant of a RICO conspiracy but not of a RICO substantive offense which requires proof of two acts of racketeering activity.

It is this court's opinion, applying the decision of the Supreme Court in *Iannelli* and following the Ninth Circuit's reasoning in *Rone,* that defendants' convictions under §1962(c) and §1962(d) did not merge for purposes of sentencing. It was within this court's sound discretion based on the facts and circumstances of this case to sentence these defendants to consecutive terms of twenty years for those convictions. Defendants have made no showing that the court abused its discretion in imposing those sentences.

In addition to the consecutive twenty-year sentences on Counts One and Two, defendant J. C. Hawkins was sentenced to three consecutive ten-year terms for three separate violations (Counts Three, Five and Six) of 18 U.S.C.A. §659 and §2 (possession and concealment of property stolen from interstate shipment), and to a fourth ten-year term for violation (Count Eight) and 18 U.S.C.A. §2315 (receipt and disposal of counterfeit securities moving in interstate commerce). Defendant Recea Hawkins was sentenced to one additional consecutive ten-year term for violation (Count Six) of 18 U.S.C.A. §659 and §2. The court ordered the sentences imposed upon J. C. Hawkins "to run consecutively, or a total of forty (40) years, whichever is lesser." The sentences imposed upon Recea Hawkins were ordered "to run consecutively, or a total of twenty-five (25) years, whichever is lesser." Since J. C. Hawkins and Recea Hawkins were given valid twenty-year sentences on both Counts One and Two, and since the maximum amount each would have to serve is forty (40) years and twenty-five (25) years, respectively, the sentences imposed on the additional

counts are merely technical sentences with no actual effect on the maximum terms of their confinement. Therefore, in effect the additional ten-year sentences are of no consequence. Nevertheless, the court will consider defendants' argument with respect to these sentences.

Defendants contend that the proof adduced during the trial and utilized to convict J. C. Hawkins on Counts Three, Five, Six, and Eight and Recea Hawkins on Count Six was identical to the proof utilized to convict on Counts One and Two, therefore merging these counts for purposes of sentencing and making the consecutive ten-year sentences for these offenses violative of double jeopardy. The court finds this contention to be without merit. The violations of 18 U.S.C.A. § §659 and 2315 alleged in Counts Three, Five, Six, and Eight were predicate or underlying offenses for purposes of proving the substantive RICO offense. Separate sentences may be imposed for acts violating two separate provisions if each offense requires proof of a fact which the other does not. *Blockburger, supra.* If the offenses underlying the "pattern of racketeering activity" consisted, for example, only of two violations of §659 or §2315, there might be a problem since proof of those two acts of racketeering would also be the proof of the "pattern of racketeering activity." But the indictment here charged, and the jury found, that these defendants were guilty of arson, actively assisting a car theft ring, murdering a key witness, and dealing in narcotics, all acts of racketeering activity, *United States v. Elliott, supra,* at 884-894. Thus, there was a sufficient basis for the convictions under §1962(c) and §1962(d) even if the §659 and §2315 offenses were stricken from the RICO charge. *Cf., United States v. Rone, supra,* at 571.

Nothing in the statutory language or the legislative history of RICO suggests that Congress intended to preclude separate convictions or sentences for the RICO offense and the predicate crimes which make up the "pattern of racketeer-
racketeering activity." Racketeering activity by definition is made up of a number of separate crimes. Further, Congress intended the Act to provide for "new penal prohibitions" and "enhanced sanctions." See footnote 6. If defendants were correct in their argument that the sentences imposed for the RICO offense must run concurrently with the sentences for any predicate crimes, there would be no "enhanced" penalties. A conviction under RICO would, in effect, grant immunity for the predicate crimes. *Id.*, at 572. For these reasons, the court concludes that the imposition of consecutive sentences for the convictions under 18 U.S.C.A. §659 and §2315, to run consecutively to the twenty-year sentences imposed for the convictions under §1962(c) and §1962(d), were proper.

For all of the above-stated reasons, the court holds that the sentences imposed in this case were within the sound discretion of this court, and under the facts of this case that discretion was clearly not abused. Accordingly, defendants' Rule 35 Motion To Correct Illegal Sentence is hereby DENIED in its entirety.

SO ORDERED, this 24th day of June, 1981.

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

Office - Supreme Court, U.S.
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SEP 30 1982
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CLERK

No. 82-121

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN CLAYBURN HAWKINS, JR., a/k/a "J.C." AND RECEA HOWELL HAWKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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D. LOWELL JENSEN
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QUESTION PRESENTED

Whether a defendant convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organization (RICO) Act and an underlying substantive RICO offense may be sentenced consecutively for those offenses.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-121

JOHN CLAYBURN HAWKINS, JR., a/k/a "J.C." AND RECEA HOWELL HAWKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 1c-10c) is reported at 516 F. Supp. 1204.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1982. A petition for rehearing was denied on May 24, 1982 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on July 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C.

1962(c), conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d), and possession of a shipment of shirts stolen in interstate commerce, in violation of 18 U.S.C. 659 and 2. In addition, petitioner J.C. Hawkins was convicted on two counts of possession of a stolen interstate shipment of meat and dairy products, in violation of 18 U.S.C. 659 and 2, and of receiving and disposing of a counterfeit security moving in interstate commerce, in violation of 18 U.S.C. 2315. Petitioner J.C. Hawkins was sentenced to consecutive terms of 20 years' imprisonment on the RICO conspiracy and substantive counts and 10 years' imprisonment on each of the remaining counts, with the proviso that he would not have to serve more than a total of 40 years' imprisonment. Recea Hawkins was sentenced to consecutive terms of 20 years' imprisonment on each of the RICO counts and 10 years' imprisonment on the one remaining count, with the similar proviso that he would not have to serve more than a total of 25 years' imprisonment.[1] The court of appeals affirmed petitioners' convictions. *United States* v. *Elliott*, 571 F. 2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

Petitioners then moved the district court, pursuant to Fed. R. Crim. P. 35(a), for correction of their sentences on the RICO counts, claiming that their convictions on these two counts merged for purposes of sentencing. The district court denied their motion (Pet. App. 1c-10c), and the court of appeals affirmed (Pet. App. 1a).

The evidence adduced at trial is set out in detail in the opinion of the court of appeals affirming petitioners' convictions (571 F. 2d at 884-895). Briefly, it showed that petitioner J.C. Hawkins headed an extensive criminal

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[1] In sentencing petitioners, the trial judge stated that it was his intention that their sentences would be fixed at terms of 40 and 25 years respectively if their convictions on counts carrying sentences in excess of that term were affirmed on appeal (Tr. 2776).

enterprise that was involved in receiving and selling stolen goods, importing and distributing narcotics, committing arson and murder, and obstructing justice in prosecutions brought against participants of the organization. J.C. Hawkins was personally involved in each of the criminal activities charged as predicate acts of racketeering. His brother, petitioner Recea Hawkins, also participated in the affairs of the enterprise through a pattern of racketeering activity. Among the specific acts proven at trial, the government established that petitioners together were instrumental in burning down a nursing home in Sparta, Georgia, at the behest of a co-conspirator (571 F. 2d at 884-885); that J.C. Hawkins, assisted by Recea Hawkins, concealed and sold part of a stolen 33,000 pound shipment of Hormel meat (*id.* at 886-887); that Recea Hawkins, at J.C. Hawkins' request, murdered an individual who was a potential witness against J.C. Hawkins in a state criminal trial (*id.* at 888-889); that petitioners concealed and sold a truckload of stolen shirts (*id.* at 891-892); that petitioners purchased several stolen automobiles from a co-conspirator (*id.* at 886); and that J.C. Hawkins purchased and concealed a truckload of stolen Swift meat and dairy products (*id.* at 889-890), was involved in selling counterfeit automobile titles (*id.* at 885-886), and also took part in several narcotics transactions involving methamphetamine, cocaine, heroin, marijuana and MDA (*id.* at 892-894).

ARGUMENT

Petitioners' sole contention is that the district court unlawfully sentenced them consecutively for the RICO conspiracy and RICO substantive offenses. They argue that the decision below, which accords with the Ninth Circuit's decision in *United States* v. *Rone*, 598 F. 2d 564, 569-571 (1979), cert. denied, 445 U.S. 946 (1980), conflicts with the en banc decision of the Sixth Circuit in *United States* v. *Sutton*, 642 F. 2d 1001, 1040 (1980), cert. denied, 453 U.S. 912 (1981).

While, as we show below, petitioners' claim that they were unlawfully sentenced is clearly without merit, it is not necessary for the Court even to reach that claim because petitioners' sentences would not be affected even if they were to prevail. It is true that the district court imposed consecutive sentences of 20 years on each RICO count. However, the court limited the total terms of imprisonment for petitioners Recea Hawkins and J.C. Hawkins to 25 and 40 years, respectively. Merger of the 20 year sentences on the two RICO counts would mean only that J.C. Hawkins' total sentence would be 60 years' imprisonment instead of 80 years. Sixty years is still far in excess of the 40-year maximum the district court provided. Recea Hawkins' total sentence in the event of such a merger would be reduced from 50 years to 30 years, which is also greater than the 25-year maximum that the court provided. Thus, even if, as petitioners claim, their RICO convictions merged for the purpose of sentencing into a single 20 year term, that would not diminish the actual period of their incarceration. Accordingly, review of petitioners' claim is unwarranted.

In any event, there is no merit to this claim. Petitioners' argument appears to rest on Wharton's Rule, which "states that an agreement between two people to a particular crime cannot be prosecuted as a conspiracy if the crime is of the type that necessarily requires the participation of two persons for its commission" (Pet. App. 3c). However, as the district court correctly ruled below (*id.* at 3c-4c), the RICO statute is not amenable to application of Wharton's Rule. See *United States* v. *Rone, supra*, 598 F. 2d at 569-571; *United States* v. *Ohlson*, 552 F. 2d 1347, 1348-1349 (9th Cir. 1977); *United States* v. *Boffa*, 513 F. Supp. 444, 478 (D. Del. 1980).

First, the plain language of 18 U.S.C. 1962(c), the substantive RICO provision, clearly indicates that a violation may be committed by an individual acting alone. The statute makes it unlawful for "any person" to conduct an enterprise affecting interstate commerce through a "pattern of racketeering activity." The definitions of "pattern of racketeering activity" (18 U.S.C. 1961(5)) and "racketeering activity" (18 U.S.C. 1961(1)) do not incorporate any element of agreement or concerted activity. See *United States* v. *Ohlson, supra*, 552 F. 2d at 1349. Even if two or more persons together constitute an associational enterprise, the proscribed activity is not the enterprise but the pattern of racketeering activity in its furtherance. Such criminal conduct can be the act of a single person. As the Ninth Circuit has observed, "[t]he enterprise is simply one of the jurisdictional elements of the statute." *United States* v. *Rone, supra*, 598 F. 2d at 570. See also *Iannelli* v. *United States*, 420 U.S. 770, 789 (1975) (the requirement of participation of "five or more persons" as an element of the substantive offense under 18 U.S.C. 1955 is jurisdictional and does not "represent[] a legislative attempt to merge the conspiracy and the substantive offense into a single crime").

Moreover, the proscribed offenses are significantly different from those, such as adultery, incest, bigamy, and dueling, to which Wharton's Rule traditionally has been applied. See *Iannelli* v. *United States, supra*, 420 U.S. at 784. In contrast to those offenses, the harm attendant upon the commission of the substantive RICO offense is not restricted to the offender; the parties prosecuted for the conspiracy need not be the same persons who are prosecuted for commission of the substantive offense; and agreements to enter into large-scale racketeering activities are likely to generate additional agreements to engage in other criminal endeavors. These significant differences

between the kind of offenses that gave rise to Wharton's Rule and the activities proscribed by RICO "counsel against attributing significant weight to the presumption the Rule erects." *Id.* at 786.

Finally, even if Wharton's Rule were otherwise applicable, it would be necessary to determine whether Congress intended to create an offense of racketeering separate and apart from conspiracy. The very inclusion in the RICO statute of a separate conspiracy provision is persuasive evidence that Congress so intended. Moreover, in its Findings and Purposes prefatory to the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923, Congress stated its goal of "establishing new penal prohibitions, and * * * providing enhanced sanctions * * * to deal with the unlawful activities of those engaged in organized crime." See also *United States* v. *Martino*, 681 F. 2d 952, 956-957 (5th Cir. 1982) (en banc), petition for cert. pending, No. 82-472.

The Sixth Circuit's offhand statement in *Sutton* that "the proofs in this record showing these defendants violated § 1962(c) and § 1962(d) were identical," and its remand for resentencing where the sentences originally imposed were consecutive (642 F. 2d at 1040), does not create a conflict warranting this Court's review. The propriety of the consecutive sentences in *Sutton* was not even addressed in the briefs before the panel or the en banc court, and the disposition appears to have been strictly limited to that case. Moreover, apart from the paragraph in *Sutton* on which petitioners rely, the Sixth Circuit has provided no further indication that it has abandoned the well settled principle that a conspiracy and its underlying substantive offense are separate crimes properly subject to consecutive punishments. See, *e.g.*, *United States* v. *Nickerson*, 606 F. 2d 156, 159 (6th Cir.), cert. denied, 444 U.S. 994 (1979). Thus, in

the future, following full briefing on the issue, the Sixth Circuit may well affirm consecutive sentences imposed for a RICO conspiracy and a substantive RICO violation. Until that circuit clearly demonstrates that it regards such consecutive sentences for RICO violations to be per se improper, any alleged conflict between *Sutton* and the decisions of the other courts that uniformly have rejected the *Sutton* approach does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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